United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4260

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, BAGEL BOX, INC., BAGEL TOWN, INC., BENSON BAGEL BAKERY, INC., CULVER BAGEL BAKERY, INC., FAR ROCKAWAY BAGEL BAKERY, INC., GOLDEN BAGEL BAKERY, INC., ISLAND PARK NASSAU BAGEL BAKERY, INC., NELSON BAGEL BAKERY, INC., NEPTUNE BRIGHTON BAGELS, INC., RUBINSTEIN BAGELS, INC., RUBINSTEIN BAGELS, INC., TRIBORO BAGEL CO. INC., D & H BAGEL BAKERY, INC., and POP'S BAGEL BAKERY, INC.,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONERS' BRIEF

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Statement of the Case

These are two petitions arising out of a decision and order of the National Labor Relations Board (hereinafter called the "Board") which granted to discriminatees back-pay awards for the period from February 1, 1967 through January 31, 1968 against the Bagel Bakers Council and

its members. The Board had adopted the recommended order of the Administrative Law Judge in its order of October 28, 1976, and had granted holiday and vacation pay claims which were not in the original backpay specifications, but which were added to the backpay claims only during the backpay specification hearings, as a result of an amendment allowed by the Administrative Law Judge during the backpay hearings, without granting the Council's request for an adjournment of the hearing.

The Council and its members seek the cancellation of any backpay specification award, in its petition for review of the Order of the Board of October 28, 1976, and the Board seeks enforcement of the Order of the Board.

Statement of Issues

The employers present the following issues:

1. Was the order and decision of the National Labor Relations Board incorporating holiday and vacation pay claims which were added to the backpay specifications only after the hearings had commenced and which utilized an outmoded and discarded method in the industry of computing holiday and vacation pay proper upon the record as a whole.

   a. Were the employers denied due process of law when they were not permitted an adjournment to investigate and prepare defenses to the holiday and vacation backpay amendment?

   b. Were the employers severely prejudiced by the granting of the application of the Board to amend the backpay specifications during the closing stages of the hearing?

2. Did the Board err in correctly determining that there had been a reduction of 60-65% in volume and payroll during the backpay period and then totally disregarding this finding in assessing backpay liability against the employers.

   a. Did the Board err in not giving effect to the industry-wide union contracts reducing labor costs by 7% operative during the lockout period.

   b. Did the Board err in totally disregarding the overtime prohibition in the union contract operative prior to and during the lockout period.

3. Did the Board err in computing interest at the rate of 6% per annum on the amount awarded as backpay, in view of the unexplained dilatoriness of the General Counsel's office?

   a. Should the employers be penalized for the Board's inordinate delay?

4. Did the Board commit reversible error in assessing backpay liability against Neptune-Brighton Bagels, Inc.?

   a. Was Neptune-Brighton Bagels, Inc. a successor corporation within the meaning and policy of the pertinent authorities?

   b. Was the assessing of backpay liability against Neptune-Brighton Bagels, Inc. proper in view of the fact that it was not served with process until three months prior to the commencement of backpay hearings and more than nine years had elapsed since said corporation had taken title to its predecessor's assets?

5. Did the Board commit reversible error in failing to predicate its findings of backpay liability upon calendar quarters?

Statement of Facts

On February 19, 1969 the Board issued its order in *Bagel Bakers Council of Greater New York and Its Employer-Members,* 174 NLRB 622, holding that the Council and its employer members had engaged in a lockout in violation of Section 8(d), and had discriminated against the members of the Bagel Bakers Union, Local 338 of the Bakery and Confectionery Workers International Union of America. The Board ordered that the Council and its members make each employee whole for any loss of earnings he may have suffered as a result of the illegal lockout.

On November 20, 1970, this Court in *N.L.R.B.* v. *Bagel Bakers Council of Greater New York and Its Employer Members,* 434 F.2d 884 (C.A. 2, 1970), cert. den., 402 U.S. 908, enforced the decision and order of the Board which found the lockout illegal. On February 25, 1971, final judgment was entered by this Court requiring that the Council and its employer members reinstate with backpay those employees locked out.

On June 15, 1976, this Court in *Silverman* v. *N.L.R.B.,* 92 LRRM 2919 (C.A. 2, 1976), granted a writ of mandamus against the Board and directed the Board to determine the backpay awards of the employees unlawfully locked out in this case within 60 days.

On June 24, 1976, the Regional Director of the Board issued a Backpay specification and Notice of hearing. The Council and its Members filed an answer on July 14, 1976,

and further, on July 14, 1976, member Neptune-Brighton Bagels, Inc., a member of the Council who became a member after the determination of the lockout, and was served with the backpay specifications and process in this case for the first time just before the hearings began before the Administrative Law Judge, moved to dismiss the proceeding as against him, on the ground that there was no jurisdiction against it, and that said corporation was not a successor.

The hearing opened before the Administrative Law Judge on July 19, 1976, and on August 5, 1976, just before the hearings on the backpay specifications were drawing to a close, the General Counsel's office moved to amend the backpay specifications to include holiday and vacation pay, notwithstanding that same had not previously been offered as backpay allegations, at any time prior to the hearings, and that more than five years had elapsed since judgment had been rendered ordering reinstatement with backpay, without any previous demand for consideration of this item. Moreover, the computation of holiday and vacation pay had changed totally from the former method of determining same, during the backpay period, from a prior "per-box" formula which existed prior to the lockout, to a varying $2.50 and $3.50 per day method paid for by only one of the employers of the affected bagel bakers, not by all employers. The General Counsel's Office failed to produce a scintilla of evidence as to how many boxes were produced by the employers during the backpay period, the boxes method having been superseded and disregarded by the industry from the time of the lockout, and failed to credit the Council members with the actual daily holiday and vacation $2.50 and $3.50 amounts paid by other employers during the backpay period, in the amendment.

The amendment was allowed by the Administrative Law Judge, though he conceded on the record that to allow it was to deny the Council members due process of law. Answer was submitted by the Council and its members to the amendment during the hearings, on August 10, 1976. The hearing was closed on August 11, 1976.

The Administrative Law Judge recognized the validity of the economic defenses asserted by the Council and its members to the backpay specifications, though he held that notwithstanding the sharp and universal decrease in volume of the Council members as a result of competition from machine made bagels, that the labor which would have been available to the discriminatees during the backpay period would not have decreased, in his decision of September 10, 1976.

On October 28, 1976, the Board at 226 NLRB No. 121, issued its decision and order adopting for the most part the decision of the Administrative Law Judge.

On November 26, 1976, the Council filed a Petition to Review certain portions of the decision and order of the Court dated October 28, 1976. The Board then filed with this Court its Cross-Application for enforcement of the Board's decision and order.

The allowing of an amendment to the backpay specification to add holiday and vacation pay denied the Council members due process of law, and the flat allowance by the Board of the former holiday and vacation pay was completely contrary to the facts as to how holiday and vacation pay was computed in theory and practice during the backpay period, the "per box" method being completely dis-

regarded in practice and in theory, but utilized by the Board. The use of the actual method of $2.50 and $3.50 per day would eliminate any backpay award based on holiday and vacation pay, since such holiday and vacation pay was paid by non-Council members.

The evidence during the hearings of the massive (60% to 65%) loss in volume of the Council members due to competition and machine made bagels was not controverted and was accepted by the Board. This must necessarily have resulted in lost availability of employment, and the backpay award to the affected employees would inexorably have to be reduced by the same formula of 60-65% reduction. The Board did not reduce the holiday and vacation pay determination by such lost volume, although it was not disputed that such volume decrease was universal, and unrelenting.

ARGUMENT

POINT I

The evidence completely refutes a finding that holiday and vacation pay is due the employees, viewed from any aspect of computation.

It was universally the testimony in the hearings that the former "boxes of bagels" method of computing holiday and vacation pay in effect prior to February 1, 1967, and previous to February 1, 1967, was completely disregarded after February 1, 1967 by the entire industry, and that after February 1, 1967 this "boxes of bagels" method of computing holiday and vacation pay was totally abandoned by the entire industry (588a, 589a, 590a, 591a, 592a).

It was universally the testimony that after February 1, 1967, and through the backpay period that ended with January 31, 1968, the discriminatees were paid sums of $2.50 and $3.50 per day by their employers in their work in lieu of the former method of determining holiday and vacation pay, i.e., "boxes of bagels" which had been the basis upon which employers contributed to holiday and vacation pay (543a, 544a, 545a, 546a, 547a, 548a, 549a, 588a).

Moreover, the $2.50 and $3.50 per day system that constituted holiday and vacation pay contributions by management on and after February 1, 1967 was mutually exclusive as to other non-contributing employers—once an employer paid that sum of money, any other employers that would have or did actually hire the bagel bakers did *not* pay such $2.50 and $3.50 contribution to holiday and vacation pay (359a).

What the Administrative Law Judge did, however, and what the Board perpetuated in its decision and order, was to duplicate and compound the holiday and vacation pay that was actually paid to the discriminatees during the backpay period, and to award it a SECOND time as additional holiday and vacation pay due to the discriminatees, so that the respective discriminatees thus made a "profit" from such computation, and thus were made more than whole by such findings of the Administrative Law Judge and the Board. Any analysis of the Board's findings in this regard shows that the Board unquestionably duplicated the holiday and vacation pay in its findings, giving blanket awards for holiday and vacation pay, based upon the pre-lockout gross earnings then designated as holiday and vacation pay prior to the lockout, notwithstanding the

fact that such pre-lockout holiday and vacation pay was computed solely and exclusively on a "boxes of bagels" method.

Furthermore, even if such adoption by the Board of the pre-lockout formula of the same gross holiday and vacation pay could somehow be justified as a matter of expediency which contradicted actual historical truth and practice in the industry which prevailed throughout the lockout and non-lockout segments of the industry, such adoption by the Board of such prior earnings was totally unjustified because of the Administrative Judge's and the Board's own findings of the 60-65% drop in volume that had prevailed throughout the industry, since the Board had determined that the Council and its members had proven the validity of their economic defenses. It would have inexorably followed that since volume—i.e., "boxes of bagels" had decreased by such vast percentage, and since "boxes of bagels" was the basis of the formula for determining contributions under the pre-lockout manner of computing holiday and vacation pay contributions by the employers, that the holiday and vacation pay that would have been due to the discriminatees must necessarily have been reduced by a like percentage (59a).

Such duplication of holiday and vacation pay in the backpay awards is completely improper under the universally accepted concept that the payment of back wages must be confined to restitution for the wrong done, and that back wages may not exceed the amount that the employees would have earned during the backpay period.

See *NLRB* v. *Mastro Plastics Corp.*, C.A.N.Y. 354 F2d 170, C.A.N.Y., cert. den. *Mastro Plastics Corp.* v. *NLRB*, 86 S.Ct. 1862, 384 US 972.

It is most significant in this regard, that having selected a discarded method of determining holiday and vacation pay that was never implemented during the backpay period and that had changed even prior to the backpay period, the Board magnified and multiplied the error in its method of computing backpay by then completely disregarding the operation of the formula that it had adopted. It completely failed to take into account the actual "boxes of bagels" that were produced or were projected as possibly being produced like the amounts produced prior to the lockout, less the 60-65% reduced volume that the Board found would have evolved (551a, 552a, 553a, 554a).

It is thus apparent that the backpay award charged the Council and its members for all the vacation and holiday pay under a discarded method which had been abandoned prior to the backpay period (543a), notwithstanding that in 1966, the year prior to the lockout, under a pooling method, both Council and noncouncil members paid holiday and vacation pay into the fund, so that the worst form of unjust enrichment of the discriminatees was effected. Hence the principle of restitution was abandoned by the Board in favor of unjust enrichment.

See *NLRB* v. *Leviton Mfg. Co.,* CCA 2, 111 F2d 619. See also *NLRB* v. *Teamsters and Allied Workers, Hawaii Local 996,* C.A.Cal., 313 F2d 655.

In effect, the Board in its award for backpay which included holiday and vacation pay based upon 1966 boxes of bagels produced completely supported the Administrative Judge's determination of 60-65% reduced volume during 1967 and 1968, but assumed in some mysterious manner that production of boxes of bagels would have been the

same for 1967 and 1968 as was the case for 1966, despite its wholly opposite finding that production had actually decreased by 60-65% (59a).

It is established that it could not properly be the role of the Board to award holiday and vacation pay so as to effect a duplication of such pay in its backpay computation. See *Moss Planning Mill Co.* (1954), 110 NLRB 933.

The grossly punitive and confiscatory nature of the Board award of holiday and vacation pay in this case is readily apparent from the record. The method of using the prior year's production of boxes of bagels was utilized by the NLRB employee who computed the backpay on the assumption that production was the same in 1967 as in 1966, and the Board premised its computation on that criterion and at the same time it had held that production decreased and evaporated consistently through the period in question, on a 60-65% reduced scale (57a, 551a, 552a, 553a, 554a).

The Council respectfully submits that the award of holiday and vacation pay was totally in error and constitutes an obvious and confiscatory duplication of awards, without any evidence in the record to support it.

POINT II

The granting of the application of the Board to amend the backpay specifications during the hearing more than five years after the backpay judgment ordering reinstatement and during the closing stages of the hearing, without allowing the Council to adjourn the hearing for investigative and other purposes constituted a denial of due process to the Council and its members by the Board and the worst form of surprise to the Council.

In clear and concise language the Administrative Law Judge stated in ruling that he would allow the amendment of the backpay specifications to include holiday and vacation pay at the late stage that such amendment was offered, that the granting of the amendment constituted a denial of due process when he stated at 337a:

> "I just can't get over the fact that you are asking me to preclude the Respondent from having a reasonable period of time to form his defense on a specification that amount to in excess of 90,000 dollars . . .
>
> . . . . .
>
> "Well, with regard to this matter of recessing the hearing, Mr. Siskin, I think you have a well taken point frankly, *and due process would require that.* (Italics supplied.)
>
> "However I am not going to allow it for this reason, the reasons that are not the Respondent's fault, and which reasons which I don't know or understand—more than five years has elapsed since the Circuit Court entered its judgment enforcing the Court's order until the present time.
>
> "I am advised administratively that as a result there's inordinate delay . . ."

The prejudice to the employer, as a matter of fact and law was thus admitted by the Judge. His ruling in allowing the amendment which was adopted and perpetuated by the Board was a highly prejudicial error and violates the basic principle of due process as the Council was never permitted to cross-examine the claimants who had testified early in the hearing (541a).

Nowhere in the record does there appear even the hint of a reason for the outrageous delay of the Board, nor was it contended that newly discovered evidence required such amendment. The Board did not claim that it did not have full knowledge of the facts at the time the original back-pay specifications were issue, nor that its delay in seeking to amend was due to oversight, inadvertence or excusable neglect.

See *Boris* v. *Moore,* 253 F2d 523, 25 FR Serv. 15a, 21, case 7; *Anderson* v. *National Producing Co.*, 253 F2d 834 (2nd Cir.), cert. denied 357 US 906, 78 S.Ct. 1151, 2 L.Ed. 2d 1157 (1973); *Darcy* v. *North Atlantic & Gulf S.S. Co. Inc.,* 78 F.Supp. 662.

After ten years of administrative delay respondents without advance warning or prior demand or presentation were confronted with a massive additional liability which they had no opportunity to investigate in advance of the trial hearing and there appeared not the hint of a reason for the granting of the amendment under the circumstances (337a-338a).

It is respectfully submitted that the time must arrive at some stage of every litigation when the party asserting liability must be required to stand upon the allegations it is asserting.

See also *Bernstein* v. *M.V. Nederlandaache Amerikaansche, etc.* (S.D.N.Y. 1948), 79 F.Supp. 38, 42.

POINT III

The backpay liability determined by the Board must be reduced by sixty to sixty-five percent for the reduced volume and payroll factor and the backpay determination must further be reduced because of the reduction of seven percent in labor costs starting February 1, 1967 and must further be reduced because of the overtime prohibition in the union contract.

The Administrative Law Judge and the Board both determined that there had been a reduction of 60-65% in volume during the backpay period, as distinguished from the preceding period, due to economic factors unrelated to the lockout. Since the piece work labor involved in this case must necessarily have varied with volume (59a), it would automatically follow that labor reductions flowed in the same percentage, something the Board refused to effectuate in its findings.

What the Board did was to assume that all of the work that would have been available to the work force of the Council members would have flowed to the discriminatees, notwithstanding the fact the discriminatees had interim earnings from non-Council members during 1967, which fact made the Board's assumption wholly invalid and illogical and unsupported by the record. What the Board did was to give 100% time effect to the discriminatees as being available to the discriminatees in relation to the job opportunities in 1967 and the Board concurrently then ignored 1967 earnings from non-Council members during 1967 and the time expended by the discriminatees in obtaining the 1967 earnings, so that what the Board did was to give more than

100% effect to the discriminatees as to work available in the Council shops and to interim earnings in the same computation.

The net effect of what the Board achieved was to hold that there was a 60-65% reduction in available work, (59a), that certain time of the discriminatees was consumed in achieving interim earnings and that the discriminatees would then still have been able to work full time for the Council shops in 1967, so that the Board unjustly enriched the discriminatees by giving them credit for the possibility that they could be in "two places at one time", thus effecting a double time profit to the discriminatees.

In this regard the only plausible and reasonable method of reflecting the decreased volume and job availability, based upon the Record, was to effect a 60% reduction in available employment for the discriminatees with the Council members and the appropriate and correct way for this to be achieved would have been a 60% reduction in the backpay awards determined under any of the possible alternative concepts of computation.

Moreover, the Board failed to reflect as reduced possible earnings during 1967 and 1968 the fact that the industry wide practice changed from the .28 per box remuneration formula previously followed prior to February 1, 1967, to .26 a box from February 1, 1967 on. Testimony as to this reduction was not contradicted by any testimony (590a, 591a) and the testimony was that this was the universal practice (590a). The Board failed to reflect this reduction of 2/28, or 7% in its determinations, and for that reason alone, apart from the others enumerated herein, the Board determination of backpay was overstated and not supported by the Record.

The Board further ignored the Union Contract in force prior to the Lockout and its prohibitions against overtime (Tr. 1482-1483* Supplement). Since average production of bagels was 1000 boxes of bagels a week (Tr. 1503 Supplement), by testimony of the prior Union President, a tremendous and inconceivable amount of overtime was projected by the Board, despite its prohibition in the Union contract. Moreover, the record is unwavering in revealing that the overtime prohibition was used in slack times, something the Administrative Judge and the Board found had occurred in the backpay periods, when the propriety of the economic defenses had been established in the proceeding.

In this connection, as regards the effect to be given collective bargaining agreements, the Supreme Court has enunciated the applicable rule as follows in *Steelworkers & Warrior & Gulf Navigation Co.* (1960), 363 U.S., 574:

> "The collective bargaining agreement states the *rights and duties* of the parties. It is more than a contract; it is a generalized code to *govern* a myriad of cases which the draftsman can not anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." (Italics supplied.)

It is respectfully submitted that the Board's determination must be reduced to reflect the foregoing factors which were ignored by the Board in computing the amount of backpay awarded. Failure to so reduce the award would

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* Appended hereto as the Appendix.

have the effect of achieving a wholly unfair administration of the governing statute and would operate to achieve an unjust enrichment to the discriminatees and be wholly punitive in effect, contrary to the pertinent rulings.

See *Oil, Chemical and Atomic Workers Intern. Union AFL-CIO* v. *N.L.R.B.*, 445 F2d 237, 144 US App D.C. 167, cert. den, *Angle* v. *N.L.R.B.*, 92 S.Ct. 713, 404 U.S. 1039, 30 L.Ed. 2d 730.

POINT IV

The inordinate delay that was no fault of the Council should bar the imposition of interest in any award against the Council and its members.

In the instant case the Board delayed in the backpay specifications and backpay hearings for over 5 years since the judgment of the Circuit Court and it required a writ of mandamus by this Court to have the Board proceed in this matter.

In the interest of equity and in view of the fact that at no time did the General Counsel come forward with an explanation for the unprecedented 5 year delay since the judgment on enforcement, it is respectfully submitted that it would be a travesty of justice for the imposition of interest, especially in view of the amendment granted by the Board to allow General Counsel to submit holiday and vacation pay additional specifications.

In this connection see *Warehouse Union Local 860, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 180 NLRB No. 113,

where the Board pointed out that a 13 month delay was not such a length of time as to make it incumbent on the General Counsel to come forward with an explanation for the delay. In the instant case, in view of the five year delay all the facts point to an abuse of discretion in the assessment of interest.

POINT V

The assertion of liability against Neptune-Brighton Bagels Inc. is an abuse of due process and said corporation is not a successor within the meaning and policy of the pertinent authorities.

It is well settled that where a new employer has acquired *substantial assets of its predecessor and continued without interruption or substantial change the predecessor's business operations,* the successor employer who has taken title to the predecessor's assets is liable jointly and severally with the predecessor for backpay. See *Golden State Bottling Co. Inc.* v. *NLRB,* No. 72-702, Dec. 5, 1973.

In the instant case the alleged successor employer, Neptune-Brighton Bagels, Inc. commenced operations totally and drastically different from its predecessor, Neptune Bagel Bakers, Inc. The customers of Neptune-Brighton were strictly retail as opposed to its predecessor's essentially wholesale route customers (495a, 496a, 497a, 498a, 505a). No attempt was made by Donald Chayofsky, the President of Neptune-Brighton to regain the wholesale accounts that its predecessor had been servicing as regular customers for several years prior to and during the lockout period (505a). The transformation from a wholesale bagel bakery to a retail bakery was complete and decisive and unrebutted by any testimony in the record.

On April 20, 1967 a contract was entered into with Neptune-Brighton Bagel Bakers, Inc. for the sale of a business, the contract having been assigned to Neptune-Brighton Bagels, Inc. and the transaction closed on April 26, 1967 (513a, 514a). The seller did not assign the lease to Neptune-Brighton Bagels, Inc. of the premises it had occupied, and in June 1967, Oscar Stern, President of the predecessor, individually issued a lease of the premises to Neptune-Brighton Bagels, Inc., so that there was no lease carry-over (497a, 515a). Donald Chayofsky thought he was merely purchasing the premises, the store being locked and empty for four months prior to his beginning afresh (496a, 518a, 506a), and this state of mind was reinforced by an affidavit annexed to the bill of sale signed by the seller that Neptune Bagel Bakers, Inc. had no debts.

Most of the machinery of the predecessor operation was abandoned, Chayofsky being compelled to buy the truck of Neptune Bagel Bakers, Inc. as a condition of the sale (498a, 507a, 514a). Moreover, the employees of the predecessor were not retained. This fact alone would require as a matter of law and public policy that Neptune-Brighton Bagels, Inc. not be deemed a successor, the United States Supreme Court in *Golden State Bottling Company, Inc., et al.* v. *National Labor Relations Board,* 414 US 168 (1973) expressly enunciating at page 184 that liability of a successor corporation is based upon and contingent upon effectuating the policies of the National Labor Relations Act in preventing labor unrest:

> "Where a new employer, such as All American, has acquired substantial assets of its predecessor and continued without interruption or substantial change the

predecessor's business operations, *those employees who have been retained* will understandably view their job situations as essentially unaltered." (Italics supplied.)

* * * * *

"To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action."

In the instant case the compelling reasons for the assertion of liability against Neptune-Brighton Bagels, Inc. are absent. The record is uncontroverted that Donald Chayofsky recalled the union employees (501a), they came and they left (502a). The evidence showed universally that Mr. Chayofsky showed no union animus nor did he evade or avoid his responsibility of dealing with the union (501a). Therefore, Neptune-Brighton Bagels, Inc. did not violate the policies underlying the act, see *NLRB* v. *Bausch & Lomb, Inc.*, 526 F. 2d 817, 90 L. R. R. M. 3217 (2d Cir. 1975), enf'g in part 214 N.L.R.B. No. 53, 88 L. R. R. M. 1196 (1974).

The procedural safeguards of due process were violated in the case of Neptune-Brighton Bagels, Inc. when just three months prior to the commencement of the Board hearings and more than 8 years after the finding by the Board that the employers of the Bagel Bakers Council had committed an unfair labor practice, said corporation was notified that it might owe liability to the discriminatees (499a). The statute of limitations had already run against Neptune Bagels, Inc., its predecessor, and thus it was deprived of its lawful remedies against the party that sold it assets and which had represented that the seller had no debts.

POINT VI

The failure of the Board to base its findings of backpay liability upon calendar quarters precludes the imposition of any backpay award.

The United States Supreme Court has placed its imprimatur on the doctrine first enunciated in the *F.W. Woolworth* case, 90 NLRB 289 (1950) that backpay liability must be computed on the method of calendar quarters, see *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 196, 97 L.Ed. 377, 73 S. Ct. 287 (1953).

It is obvious in the instant case that in view of the findings of the Board of the depressed nature of the industry during the backpay period, that the failure of the Board to utilize the calendar method of computing backpay liability renders the Board findings reversible on that ground alone.

CONCLUSION

The Board's findings should be corrected to reflect the foregoing adjustments to properly result in a just and equitable liability determination.

Dated: New York, N. Y.
January 26, 1977

Respectfully submitted,

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APPENDIX

Excerpts From Transcript

[1482] Q. And were you also on any committee for the preservation of jobs in the industry? A. Yes.

That was part of the trade committee.

Q. When did you serve on that committee? A. From 1965 to 1967.

Q. Now, are you familiar with the contracts that the union made with the employees during the years that you were a union official? A. From what I remember I was familiar with most of it.

Q. Do you recall the overtime clause in the union contracts? A. Yes, I do.

Q. Do you recall what purpose the—in design and what purpose in practice that clause served as? A. Well, there was a couple of reasons why it was put there, but the main reason was that in the event that there would be any shift in production or anything, the union would protect itself with the 100 boxes.

That would be the basis for the days pay, was the 100 boxes.

In the event of a shift in work, we had enough men just for the 100 boxes.

That they—we didn't have to produce any more.

Q. Is it fair to say that it was a device to spread [1483] the work out among the members? A. No question about that.

Q. And was that device utilized in times of slack periods? A. Overtime, right.

Q. And in a period of contracts of business, would that clause be enforced by the union? A. Yes, it would be.

Q. And was it enforced by the union? A. Definitely.

Q. And do you know this of your own knowledge? A. Definitely.

Q. Now, was that true during the time you were president of the union? A. Yes, it was.

Q. And will you tell us what other purposes that clause served as and how it was implemented by the union? A. Well, it was used as a weapon sometimes, where an employer, if they—if he had three or four hundred boxes, and he stepped out of line so to speak, so the union would send in the men, they'd make off the 100 boxes, which that was the heart of the contract.

After the 100 boxes the men went home.

They did not have to make overtime and they'd go home.

And they would leave him with no production so to speak.

* * * * *

[1503] * * * * *

[Judge Rosen]

And furthermore, you do have the facts.

If you want to make some kind of an overtime argument—he stated his judgment the average bagel baker made about 1,000 boxes a week.

You can make any argument you want from that fact.

I think that's the critical fact.

Go ahead.

* * * * *

State of New York,
County of New York,
City of New York—ss.:

Stephan Axelrod being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of January, 1977, he served 2 copies of the Brief for Petitioners on JOHN C. TRUESDALE, Executive Secretary N.L.R.B. (AND TO THE PARTIES AND THEIR ADDRESSES AS INDICATED ON THE ATTACHED LIST,) the attorney for the National Labor Relations Board, Respondent by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at ~~90 Church~~ Christopher & Washington Streets, Borough of Manhattan, City of New York, directed to said attorney at No. National Labor Relations Board, Washington, D.C. 20570 that being the address designated by him for that purpose upon the preceding papers in this action.

Stephan Axelrod

Sworn to before me this
26th day of January, 1977.

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978

JOHN C. TRUESDALE, ESQ. Executive Secretary
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Washington, D.C. 20570

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